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ONE HUNDRED NINTH CONGRESS

# Congress of the United States

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April 14, 2005

The Honorable David M. Walker  
Comptroller General  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Mr. Walker:

We are writing to request that you study the effects of S. 5, the so-called "Class Action Fairness Act of 2005,"<sup>1</sup> on consumer, civil rights, and labor class actions; individual "mass tort" actions; and the legislation's impact on the workload of the federal judiciary.

Among other things, S. 5 provides, in most cases, for the removal of state class action claims for violations of state law involving 100 or more plaintiffs and aggregate damages of \$5 million or more to federal court where any member of the plaintiff class is a citizen of a different state than any defendant.<sup>2</sup> The new law also specifies that certain non-class actions that are proposed to be tried jointly in state court (referred to under the bill as "mass actions") will be treated as class actions for purposes of the bill and thus be removable to federal court.<sup>3</sup>

S. 5 has been criticized by a wide range of public interest groups and other entities, including judicial, legislative, consumer, environmental, health, civil rights and labor groups. All told, more than 100 such groups have expressed opposition to the legislation.

As a result of these concerns, we ask that you investigate the following:

1. Impact on Consumer Class Actions

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<sup>1</sup>Class Actions Fairness Act of 2005, Pub. L. No. 109-2 (signed into law by President Bush on Friday, February 18, 2005).

<sup>2</sup>28 U.S.C. § 1332(d)(2), as amended by S. 5, §4(a).

<sup>3</sup>28 U.S.C. § 1332(d)(2), as amended by S. 5, §4(a)(11).

The *New York Times* recently wrote that “the main impact of the bill ... will be to funnel nearly all major class-action lawsuits out of state courts and into already overburdened federal courts ... [and] make it harder for Americans to pursue legitimate claims successfully against companies that violate state consumer, health, civil rights and environmental protection laws.”<sup>4</sup> There is a concern that many consumer class action cases will not be heard on their merits at all because, among other things, some federal appeals courts have refused to certify multi-state class actions in recent years.<sup>5</sup>

As a result, we ask that you: (1) identify the number of (a) consumer (e.g., fraud, bad faith, anti-lending, etc.) class actions and (b) defective products class actions filed in state and federal courts annually, (i) during the 3 years prior to the date of the enactment of the law and (ii) during the 3 years subsequent to the date of enactment of the law; (2) for both state and federal consumer and defective product cases, in each time period, identify: (a) the number of cases that were eligible for both federal and state court jurisdiction prior to enactment of the law; (b) the number that were (i) dismissed prior to class certification, (ii) denied class certification, (iii) certified as class actions and (iv) dismissed after class certification; (3) for all cases that were denied certification as class actions, the reasons for certification denial, including specifically, denials of certification on the grounds that the putative class included multi-state claims; (4) for all cases, the median and mean time from filing to ruling on class certification or dismissal.

## 2. Impact on Civil Rights and Wage and Hour Class Actions

We are also concerned that S. 5 will make it more difficult for individuals to obtain redress for state law civil rights and labor violations. This is important because many states provide broader anti-discrimination<sup>6</sup> and wage and hour protections<sup>7</sup> than corresponding federal laws.

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<sup>4</sup>Editorial, *A Dismal Class-Action Finale*, N.Y. Times, Feb. 12, 2005.

<sup>5</sup>According to Harvard Law Professor Arthur Miller, an expert on federal civil procedure, no federal circuit court has granted certification to a nationwide consumer class and six circuits have expressly denied certification. See Letter to Senator Bingaman, June 17, 2004. See also, e.g., *Wadleigh v. Rhone-Poulenc*, 51 F.3d 1293 (7<sup>th</sup> Cir. 1995); *Castano v. American Tobacco*, 84 F.3d 734 (5<sup>th</sup> Cir. 1996); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 310 (5<sup>th</sup> Cir. 2000); *In re: American Medical Systems, Inc., Pfizer, Inc.*, 75 F.3d 1069, 1085 (6<sup>th</sup> Cir. 1996); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7<sup>th</sup> Cir. 2002).

<sup>6</sup>For example, many states have broader definitions of disability, national origin discrimination, and genetic discrimination than does federal law.

<sup>7</sup>For example, the federal Fair Labor Standards Act offers no protection for a worker who worked 30 hours and is paid for 20 hours, so long as the worker’s total pay exceeds minimum wage for the 30-hour period, while many states require the worker to get paid for the full extent of his or her work.

As a result, we ask that you: (1) identify the number of state civil rights and wage and hour class actions filed in state and federal courts annually, (i) during the 3 years prior to the date of the enactment of the law and (ii) during the 3 years subsequent to the date of enactment of the law; (2) for state civil rights and wage and hour class actions filed in both state and federal courts, in each time period, identify: (a) the number of cases that were eligible for both federal and state court jurisdiction prior to enactment of the law; (b) the number that were (i) dismissed prior to class certification, (ii) denied class certification, (iii) certified as class actions and (iv) dismissed after class certification; (3) for all cases that were denied certification as class actions, the reasons for certification denial, including specifically, denials of certification on the grounds that the putative class included multi-state claims; (4) for all cases, the median and mean time from filing to ruling on class certification or dismissal.

3. Impact on Mass Action Cases, Including Those Involving Vioxx, Celebrex, and Bextra

We are also concerned about the law's impact on victims of personal injury cases resulting from mass torts, such as large-scale accidents, environmental disasters, or dangerous drugs that are widely sold (*e.g.*, Vioxx, Celebrex, and Bextra). As noted above, under S. 5, these cases may be classified as "mass actions" and funneled into federal court as well. This could mean that individual legal actions bundled together by the court for efficiency or other reasons could be transferred to federal court where they may be subject to dismissal or significant delay.

As a result, we would ask that you identify (a) the number of "mass action" cases involving individual claims that were removed to federal court as a result of the provisions of S. 5 (including, without limitation, identifying any cases involving harm from Vioxx, Celebrex, and Bextra); (b) the number of such cases that ended up in federal court and how they were eventually resolved; and (c) for those cases that ended up in federal court, the average and median lengths of time until they were ultimately resolved (in each case, compared to the length of time it takes comparable actions to be resolved in state courts).

4. Impact on the Federal Judiciary

Finally, we are concerned about the legislation's impact on the federal judiciary's workload. As noted above, S. 5 could result in the removal of most state court class actions and mass tort cases to federal court, even though the federal courts have only 678 judges<sup>8</sup> compared to more than 9,000 state court judges,<sup>9</sup> and these cases are among the most complex and

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<sup>8</sup>2003 Judicial Business, Annual Report of the Director of the Administrative Office of the U.S. Courts, Table X-1A.

<sup>9</sup>National Center for State Courts, State Court Caseload Statistics 2003, State Court Structure Charts.

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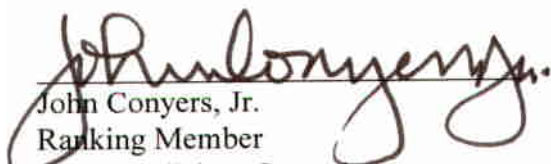
time-consuming cases that courts must decide.<sup>10</sup> It is for such reasons that Chief Justice Rehnquist has criticized Congress for its “propensity to enact more and more legislation which brings more and more cases into the federal court system,” and the Judicial Conference complained S. 5 “would add substantially to the workload of the federal courts and [is] inconsistent with federalism.”<sup>11</sup>


As a result, we ask that you identify (a) the aggregate number of class action and mass tort cases filed in state courts subsequent to the date of enactment of the law, or that were, prior to the law, eligible for both federal and state court jurisdiction but ended up in federal court as a result of the provisions of S. 5; (b) the average and median lengths of time it takes the federal courts to resolve such actions; and (c) any impact the diversion of these cases to federal courts has on (i) the ability of courts to expeditiously resolve other federal cases; and (ii) the financial implications to federal courts because of these added responsibilities.

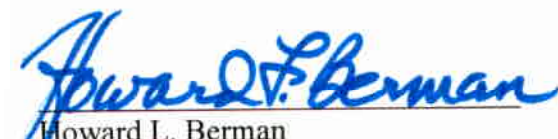
The results of your investigation will be very important to us and are time sensitive. Therefore, we ask that you work with the federal and state judiciaries and relevant parties to study the impact of S. 5 over the first three years of its application, and request that your final report be completed by June 30, 2008. We would also like two interim reports based on data received in the first and second years after S. 5's enactment, to be completed by June 30, 2006 and June 30, 2007, respectively.


Thank you for your prompt consideration of this matter.

Sincerely,

  
John Conyers, Jr.  
Ranking Member  
House Judiciary Committee

  
Patrick J. Leahy  
Ranking Member  
Senate Judiciary Committee

  
Howard L. Berman  
House Judiciary Committee

  
Edward M. Kennedy  
Senate Judiciary Committee

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<sup>10</sup>Studies have shown that class actions on average consume between five and seven times more judicial time than the typical civil case. See *Wilging et al.*, “Empirical Study on Class Actions in Four Federal District Courts,” Federal Judicial Center (1996).

<sup>11</sup>Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to the Honorable Orrin G. Hatch, Chair, Committee on the Judiciary, United States Senate, Mar. 26, 2003, at 2.



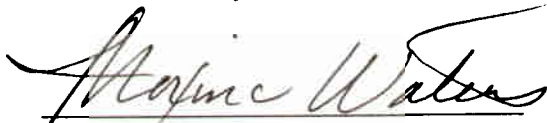
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Zoe Lofgren  
House Judiciary Committee



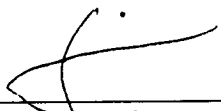
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Sheila Jackson Lee  
House Judiciary Committee



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Maxine Waters  
House Judiciary Committee



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Anthony D. Weiner  
House Judiciary Committee



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Russell D. Feingold  
Senate Judiciary Committee



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Richard J. Durbin  
Senate Judiciary Committee



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William D. Delahunt  
House Judiciary Committee



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Linda T. Sánchez  
House Judiciary Committee